

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000367-001 DT

08/11/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

ROGER KEVIN HAYS

v.

DARA LEE GARCIA (001)

MARK S WHITNEY

MESA CITY COURT
REMAND DESK-LCA-CCC
HONORABLE J MATIAS TAFOYA
PRESIDING JUDGE
MESA CITY COURT
245 W 2ND STREET
MESA AZ 85201
PAUL THOMAS, COURT
ADMINISTRATOR
MESA CITY COURT
245 W 2ND STREET
MESA AZ 85201

RECORD APPEAL RULE / REMAND

MESA MUNICIPAL COURT

Cit. No. #871493

Lwr. Crt. No.: 2004019761

Charge: 1) DUI-LIQUOR/DRUGS/VAPORS/COMBO

DOB: 03/15/58

DOC: 03/16/04

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I. JURISDICTION

This court has jurisdiction pursuant to Article VI, Section 14 of the Arizona Constitution.

II. FACTS/PROCEDURAL HISTORY

On March 16, 2004, at approximately 12:24 p.m. Appellant Dana Garcia (Garcia) was observed to be driving erratically in the area of Mckellips and Power in Mesa, Arizona. After entering a Home Depot parking lot, Garcia was observed exiting her vehicle and walking in an unstable manner. The police were then called to the scene and conducted a DUI investigation.

Garcia appeared drowsy and confused. Believing she might be impaired by drugs, the police asked Garcia if she had taken any medication. Garcia replied that she had taken Soma, Ultram, Clonazepam, Restoril, Seroquel and Eflexor. When questioned as to whether she thought these drugs would effect her driving, Garcia stated that she thought the Seroquel did. Garcia also admitted that she had taken Percocet and 1000 milligrams of Seroquel at 7:00 am that morning.

Garcia was charged in municipal court with a violation of A.R.S. § 28-1381(A) (1) Driving under the Influence of Drug, a class 1 misdemeanor and A.R.S. § 28-229.1, a civil traffic violation.

In a pretrial motion in limine, Garcia asked the trial court to preclude any testimony from Officer Galloway, among others, that the defendant was impaired by or under the influence of drugs. Although the trial court indicated that it would not allow Galloway to testify in an alcohol case on whether a defendant was driving under the influence, it would allow Galloway, who was qualified as an expert witness, to testify that Garcia was impaired by drugs. The motion was denied.

In a second motion in limine Garcia moved to preclude her statement to the police that prior to driving she had taken the following medications: Soma, Ultram, Soroquel, Clonazepam, Effexor and Percocet. Garcia argued that the State was precluded from offering into evidence any statements of her drug usage for drugs not found in the urine. Garcia asserted that the statements were precluded because the State could not establish the *corpus delecti* necessary for the foundation to the introduction of her admissions. That motion was denied.

At trial, Officer Galloway testified that Garcia admitted that she had taken Percocet and 1000 milligrams of Seroquel at 7:00 a.m. that morning. According to the officer, Garcia had a flushed face, slurred speech, droopy eyes and impaired coordination. Officer Galloway testified that, after conducting a drug recognition evaluation at the scene, it was his opinion Garcia was impaired by and under the influence of drugs.

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Two criminalists testified on behalf of the State. Ted Hanson of the Mesa Police Crime Laboratory tested Garcia's urine in an initial screening for drugs. The drugs came back positive for two categories of drugs, benzodiazepines and opiates. Southwest Laboratories conducted a confirmation testing. Mike Grommes, a Southwest Laboratories employee testified that he tested the urine and found three drugs, all central nervous system depressants or their metabolites. In particular, Garcia's urine contained a metabolite of Clonazepam (Klonopin), Oxazepam (Serax) and Temazepam (Restoril). According to Grommes, CNS depressants can cause drowsiness, confusion and impaired driving. Grommes also stated that Southwest Laboratories does not test for Percocet or for all types of benzodiazepines.

Garcia called her treating nurse to testify as an expert witness. The witness testified that the drugs taken by Garcia at 7:00 a.m. would not affect Garcia by 12:30 p.m., the approximate time of the arrest. The witness was difficult and argumentative. She responded to questions with questions of her own, and gave unresponsive answers to questions. In the presence of the jury, the court admonished the witness to answer the question. The witness argued with the court. The court directed her to answer the questions posed, and only those questions. In a later discussion held outside the presence of the jury, the court threatened to hold the witness in contempt if she interrupted the court and continued not to respond to the prosecutor's cross-examination.

The jury found Garcia guilty of violating A.R.S. § 28-1381(A ((1), driving under the influence of a drug, a class 1 misdemeanor and responsible under A.R.S. § 28-729.1, a civil traffic violation.

Garcia filed a timely appeal.

III. ANALYSIS

A. Introduction

On appeal, Garcia argues that her conviction should be reversed because: (1) it was reversible error for the trial court to deny her motion in limine precluding Officer Galloway to testify that in his opinion, Garcia was impaired by drugs; (2) it was reversible error for the trial court to deny Garcia's motion in limine based on *corpus delecti*; (3) the trial court's reprimand of Garcia's expert in front of the jury and his threat of contempt against the same witness outside of the presence of the jury intimidated the expert such that Garcia was denied a fair trial.

B. Motions in Limine

1. Standard of Review

Motions in limine are treated as motions to suppress and trial court rulings are reviewed on appeal for abuse of discretion. State v. Zimmerman, 166 Ariz. 325, 328, 8902 P.2d 1024 (Ct. App. 1990).

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2. Motion in Limine – Expert Opinion Testimony

Garcia argues that it was reversible error for the trial court to allow Officer Galloway to testify that she was impaired by drugs, essentially saying that she had committed the crime of which she was accused. The seminal case on this issue is Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121. (1983). Garcia contends that in Fuenning, the Arizona Supreme Court held that a police officer is not permitted to testify as whether, in the officer's opinion, a DUI defendant was intoxicated. Contrary to Garcia's assertions, Fuenning does not absolutely bar such testimony.

But in dicta, Fuenning strongly admonishes trial courts to generally avoid admitting this type of opinion testimony. Fuenning states that usually it is neither necessary nor advisable to ask for a witness opinion on whether the defendant is guilty of the crime with which he is charged. Id. at 605, 680 P.2d at 136. In a DUI prosecution, when the officer is being asked whether the defendant drove while intoxicated, the witness is actually being asked whether the defendant is guilty. Id. at 605, 680 P.2d at 136. The Fuenning opinion observes that "ordinarily, more prejudice than benefit is to be expected from this line of questioning." Id. at 605, 680 P.2d at 136. Witnesses are not permitted as experts on how juries should decide cases. Id. at 600, fn.7, 680 P.2d at 131, fn.7. Emphasizing this point, the Supreme Court denied the State's motion for reconsideration on this issue. Id. at 605, 680 P.2d at 136.

In this matter, the State cites to State v. Herrera, 203 Ariz. 131, 51 P.3d 353 (Ct. App. 2002) as supporting its position that the arresting officer's opinion as whether defendant was driving under the influence of drugs is admissible. But Herrera points in the opposite direction. In Herrera, the trial court struck the officer's opinion and admonished the jury to disregard it. Id. at 135, 51 P.3d at 357. The trial court then specifically determined that the defendant could still receive a fair trial. Under these circumstances, the Herrera court held that the defendant had not been prejudiced. Id. at 135, 51 P.3d at 357. In this case, the evidence was admitted and no admonition was given. No finding was made concerning whether the defendant had been prejudiced by the opinion.

Relying on State v. Carreon, 151 Ariz. 615, 729 P.2d 696 (Ct. App. 1986), the State also argues that jurors are unfamiliar with the effect of drugs upon an individual's ability to drive and that an expert is needed to advise the jury on when an individual is impaired by drugs. In Carreon, a police officer was permitted to testify that based on his experience, the drugs the defendant possessed were possessed for sale. Id. at 617, 729 P.2d at 698. The Carreon court noted that if the expert testimony assists the trier of fact to understand the evidence or determine a fact issue that testimony could still be allowed even if it touches on the ultimate issue of guilt. Id. at 617, 729 P.2d at 698. Carreon presented a situation where the jury was unlikely to be familiar with the evidence that would establish the crime, possession of drugs for sale. This case, however, resembles the Fuenning situation, rather than Carreon.

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The crime in this matter, a violation of A.R.S. § 28-1381(A)(1), driving under the influence, is the same type of crime committed in Fuenning. The expert opinion evidence rejected by the Fuenning decision, an opinion on whether the defendant was driving while impaired, is the same type of evidence admitted in this case. The only distinction is the *cause* of the impairment, drugs rather than alcohol. Although the State asserts otherwise, this Court concludes that the symptoms of impairment caused by drugs, drowsiness, confusion, staggering, driving in an erratic manner, are not so unusual and different from alcohol impairment that drug impairment should be treated differently. A juror using common sense, life experience and education can determine whether someone is impaired, regardless of the cause. This is particularly true because Fuenning permits the State to ask the expert to identify symptoms of impairment, whether those symptoms can be caused by intoxication or drugs, and whether a defendant seemed to display such symptoms. Fuenning, supra, 139 Ariz at 605, 680 P.2d at 136.

The trial court erred in admitting the opinion evidence. The admission of the expert opinion concerns an ultimate issue of fact in this case, Garcia's guilt. Garcia's right to a fair trial is prejudiced.

3. Motion in limine – corpus delecti

Garcia argues that her statements to the police that prior to driving she had taken Soma, Ultram, Soroquel, Effexor and Percocet should not be admitted. Garcia asserts that the State was precluded from offering into evidence any statements of her drug use for drugs not found in Garcia's urine because the State could not establish the *corpus delecti* foundation necessary to introduce her admissions.

All that is required to permit the admission into evidence of a defendant's incriminating statements or confessions is independent evidence creating a reasonable inference that a crime has been committed and that someone committed that crime. State v. Hernandez, 83 Ariz. 279, 282, 320 P.2d 467 (1958). Only a reasonable inference of corpus need be proven, proof beyond a reasonable doubt is not necessary. State v. Gerlaugh, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982). In this case, testimony was offered indicating that Garcia was driving and that she demonstrated signs of impairment. There was evidence that the impairment was consistent with being under the influence of drugs, particularly depressants and narcotic analgesics. Two categories of drugs, benzodiazepines and opiates, were found in Garcia's urine. The drugs which Garcia ingested fall into one of these categories. Another test found the metabolites of three specific drugs in the urine. Two of these drugs were drugs that Garcia had admitted taking.

A.R.S. § 28-1381(A ((1) requires proof that a defendant is driving under the influence of drugs. But the statute does require the State to prove that a *particular* drug was taken by a defendant. The State offered admissible evidence that the defendant was driving or in control of a motor vehicle while under the influence of drugs. The categories of drugs were consistent with the specific drugs that Garcia admitted she had ingested. Two of the specific drugs detected were drugs that Garcia admits taking. This is sufficient independent evidence to create the

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inference that a crime has been committed and that Garcia committed the crime. Her admission that she had taken five particular drugs becomes admissible regardless of whether the State has specific proof of the existence of each particular drug in Garcia's urine.

The trial court did not err in admitting Garcia's statements.

C. Trial Court's Treatment of Expert Witness

1. Standard of Review

The trial judge has the authority to determine and control the method of examination at trial. Pool v. Superior Court, 139 Ariz. 98, 103-04, 677 P.2d 266-67 (1984).

2. Treatment of Expert

Garcia contends that she was denied a fair trial because the trial court reprimanded Garcia's expert in front of the jury and threatened contempt against that witness outside of the presence of the jury, thus intimidating the witness. This Court has carefully reviewed the transcript of the testimony of Robin McKinion, Garcia's expert witness. The transcript indicates that McKinion was a difficult and occasionally obstreperous witness.

Ms. McKinion gives sarcastic and unresponsive answers during the State's cross-examination. McKinion argues with both counsel and the court. She repeatedly ignores the admonitions of the trial court with respect to answering questions. On the issue of the reprimand, the trial judge's handling of the matter is careful and demonstrates considerable patience. With respect to the contempt threat, that action is taken outside of the jury and is not unreasonable given the witnesses' conduct. There is no evidence in the record that the contempt threat intimidates the witness or changes her testimony.

The trial court's treatment of Garcia's expert witness was proper and appropriate.

IV. CONCLUSION

This Court concludes that the trial court erred in admitting Officer Galloway's expert opinion that Garcia was impaired while driving due to the influence of drugs. Garcia was denied a fair trial as a result.

This Court also decides that the trial court correctly admitted Garcia's statements concerning her ingestion of drugs.

The trial court's treatment of Garcia's expert witness was appropriate and did not deny Garcia a fair trial.

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IT IS ORDERED:

- (1) The judgment of guilt is reversed;**
- (2) The case is remanded to the Mesa City Court;**
- (3) A new trial is ordered;**
- (4) The trial court may take any other necessary action consistent with this opinion.**